# Court of Appeals, State of Michigan

## ORDER

Daniel Howe v Michael Boucree

Docket No. 273949

LC No. 02-073710-NH

Richard A. Bandstra
Presiding Judge

Pat M. Donofrio

Deborah A. Servitto
Judges

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The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued March 27, 2008 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 10 2008
Date

Sandra Schultz Mengel
Chief Clerk

# STATE OF MICHIGAN

# COURT OF APPEALS

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DANIEL HOWE,

Plaintiff-Appellee/Cross-Appellant,

v

MICHAEL BOUCREE and FLINT NEUROSCIENCE CENTER,

Defendants,

and

BHADRABALA B. GANATRA, MD, individually and d/b/a BHADRABALA B. GANATRA, M.D., P.C.,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
June 10, 2008

No. 273949
Genesee Circuit Court
LC No. 2002-073710-NH

ON RECONSIDERATION

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Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant[1] appeals as of right the trial court's denial of her request for a new trial. Because plaintiff's counsel's misconduct demands a new trial, we reverse.

In this medical malpractice action, plaintiff alleged he was misdiagnosed and mistreated by all defendants and that he suffered serious and permanent injuries as a result. Plaintiff settled his claims against defendant Dr. Boucree, and a jury trial proceeded against defendant. The jury ultimately returned a verdict in plaintiff's favor and against defendant, allocating 20% fault to

[1] "Defendant" refers to Dr. Bhadrabala B. Ganatra, as the d/b/a defendant's liability is derivative in nature.

plaintiff. The trial court denied defendant's request for a set-off of collateral source benefits and the Boucree settlement amount. After a judgment was entered in plaintiff's favor, the trial court also denied defendant's request for a new trial. This appeal followed.

Defendant first argues on appeal that the trial court's denial of her request for a new trial constituted an abuse of discretion, given that plaintiff's counsel engaged in attorney misconduct throughout the course of trial that was so pervasive that it tainted the entire trial. A careful review of the record leads to the conclusion that the conduct of plaintiff's counsel frequently exceeded permissible bounds and that a new trial is thus warranted.

A trial court's decision granting or denying a motion for a new trial will not be reversed absent an abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997). "While a lawyer is expected to advocate his client's cause vigorously, 'parties are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion and prejudice.'" *Wayne Co Bd of Rd Commr's v GLS LeasCo, Inc*, 394 Mich 126, 131; 229 NW2d 797 (1975) (internal citation omitted). Counsel may not seek to divert the jurors' attention from the merits of the case and to inflame the passions of the jury. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 770-778; 685 NW2d 391 (2004).

In *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), our Supreme Court set forth the following rules for analyzing an attorney misconduct claim:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted.

An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial jury or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. *Hunter v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996) (citations omitted); *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 501-502; 668 NW2d 402, 412 (2003). Instruction by a trial court to the jury before opening statements and following closing arguments that the statements of counsel are not evidence is generally sufficient to cure any prejudice which might arise from remarks by counsel that are improper. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). It is, of course, the responsibility of the trial judge to attempt to limit and control attorney misconduct. See *Reetz, supra*, at 103, fn 9.

As we stated in *People v Brocato*, 17 Mich App 277, 290; 169 NW2d 483 (1969), quoting *State v Tolson*, 248 Iowa 733; 82 NW2d 105 (1957), " 'It is sometimes said that error "crept" into the trial of a lawsuit. Not so in the case at bar. It marched in like an army with banners, and trumpets. It was escorted, and emphasized, and aggravated by the attorney. . .' " The same can be said here.

In this case, the record is replete with comments and statements by plaintiff's counsel that evidence a deliberate course of conduct aimed at preventing a fair and impartial jury and which deflected the jury's attention from the issues involved. For example, counsel belittled witnesses on the stand and made improper statements to the jury. On several occasions, counsel informed the jury that defendant's expert intended to deceive them. When he disagreed with the expert, counsel stated to him on cross-examination, "Just so I'm not crazy, let's see who is"; and when he questioned the expert's truthfulness, stated, "No, no. Oh, God. Possible? Oh my God, you're not gonna—" and, "Oh boy. Possible or probable. Eighteen thousand buys a lot, doesn't it doctor?"

Counsel also made wholly improper statements to defendant during cross-examination, including, "I suggest that we end this now and that you admit that you violated the standard of care which caused injuries. That's my suggestion and stop wasting time. . ." and, "this is where you violate the standard of care, so listen carefully because I don't want you to mess me up." Counsel additionally made gratuitous remarks about his perception of the truthfulness of defendant's testimony. As stated in *Wayne Co Bd of Rd Com'rs, supra*, at 134, "[w]itnesses should not be subjected to personal attacks and unsubstantiated insinuations. Each party is entitled to present its case on the merits, free from remarks of opposing counsel which may prejudice the jury and divert its attention from the real issues." Irrelevant, disparaging and accusatory remarks divert the attention of the jury from the merits of the case.

On several occasions, plaintiff's counsel pandered to the jury. During his opening statement, counsel referenced plaintiff's bedsores and commented that "one of the jurors has worked at a convalescent home and knows what happens. . ." Counsel also asked the jury to imagine themselves in certain situations during his opening and closing statements, asking, for example, "Can you imagine your son, your child is lying in bed unable to move, a quadriplegic, and the doctor calls you back twelve days later?" It is improper for a party to appeal to the sympathy and the self-interest of the jury during opening statement or closing argument. See *Rogers v Detroit,* 457 Mich 125, 149; 579 NW2d 840 (1998), overruled on other grounds *Robinson v Detroit,* 462 Mich 439; 613 NW2d 307 (2000). With the above statements, counsel was appealing to the sympathy and self-interests of the jury and the comments were improper.

Perhaps the most blatant examples of counsel's inappropriate conduct can be found in his repeated comments and his "testimony" that defendant could not find a doctor in Michigan or the surrounding states willing to testify on her behalf--a fact not borne out by the testimony. During his opening statement, plaintiff's counsel stated that Dr. Tselis's testimony that plaintiff had the signs and symptoms of CIDP was actually "criticizing one of his own, which is rare, if it ever happens in a case, that a treater from the state of Michigan will actually point the finger at another doctor. . ." Counsel continued with this line of comments, stating during his examination of defendant, for example, "Now let's look to Dr. Horenstein, the man hired by you, the only one who will stand here in your favor and testify on your behalf from Missouri."

Counsel also made comments indicating that other doctors/experts did not support defendant:

> Dr. Leachter thought there was a lot more testing you should have ordered, didn't he? Your expert neurologist who swore under oath of what should have been done by you pursuant to the standard of care; am I right?. . .
>
> ***
>
> You want to know other interesting fact Dr. Leachter gave us as to why he's not gone be called in this case by defense? Is because he said Daniel Howe's permanent injuries didn't occur till significantly after you treated him, didn't he?

and:

> Dr. Watts isn't here anymore, you know that, don't you. . .Have you talked to him about this case at all? Do you know he refused to be involved in anyway in this case on your behalf? I asked him for his testimony. . .and he refused. He said 'she was a colleague of mine.'
>
> Neither Dr. Leachter nor Dr. Watts testified.

Defense counsel repeatedly made objections to counsel's statements on this issue, but they continued throughout closing argument. In his closing argument, plaintiff's counsel stated, "There's not a neurologist in the state of Michigan that supports Dr. Ganatra in this case. So, let's go over the next bordering state, Ohio. There wasn't a neurologist in Ohio that would support Dr. Ganatra. And if we go on to Indiana and Illinois, and then we'll eventually get to Missouri, where they find a very nice man. . . Dr. Horenstein. . ."

These comments, individually, are completely inappropriate and, when taken together, indicate a deliberate course of conduct aimed at preventing a fair and impartial jury. The error was not harmless, as counsel "testified" as to what witnesses who were not called to testify would have said about defendant's treatment, with no support from the record. Counsel also repeatedly commented that no Michigan neurologist would have supported defendant, and affirmatively stated that she was actually unable to find anyone in surrounding states to support her. There is no support for such comments in the record. While it is legitimate to point out that an opposing party failed to produce evidence that it might have (See, *Reetz, supra*, at 109), plaintiff's counsel when far beyond simply questioning a lack of evidence and injected into the trial his theories or thoughts as to why these doctors did not testify, and affirmatively stated that Dr. Ganatra could not find any doctor at all in the surrounding states to support her. Given that expert testimony is essential to a medical malpractice case for both the plaintiff and defendant, (see, e.g., *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005)), unsupported comments concerning what non-testifying experts allegedly told plaintiff's counsel and whether defendant could find a local expert to testify on her behalf could very well have affected the result of this trial.

Additionally, plaintiff's counsel frequently inserted his own commentary into and "testified" during objections, made statements concerning facts not otherwise in evidence, and engaged in direct colloquy with defense counsel. Examples include:

> (objecting) "Your Honor. . . it's interesting, but he's not a diabetic. And certainly a history of diabetes by a doctor. . . would probably be pretty illuminating"
>
> (objecting) "Your Honor, asked and answered now what, the twelfth time? To say it makes it true after you've said this?"
>
> (questioning a witness) "And where were—where were the [anal] warts, I'm sorry to say? And Mr. Smith [defense counsel] loves this issue."
>
> (objecting) "Your Honor, can I place an objection? There's nobody in this case at any time that thinks that Daniel Howe had congenital myopathy. It's totally irrelevant. . . . the jury by pointing to congenital and metabolic, and counsel knows very well he never had any congenital or metabolic abnormality. But in an effort-in an effort to confuse the jury, that's all the purpose of what the question is."
>
> (responding to defense counsel's objection): "Do we have a stipulation, then that he's permanently and totally disabled?"
>
> (when defense counsel objected to the questions posed to a witness) "I don't know why counsel is going out of his way to- interrupt the doctor—with his answer. Is he not (indistinct) what the doctor's gonna say?"

It is not necessary for us to detail every impropriety contained in the record. Suffice it to say that the cited examples represent a mere sampling of the myriad inappropriate commentary and "testimony" by plaintiff's counsel.

Defense counsel made a multitude of objections, most of them sustained, and moved for a mistrial four times throughout the course of trial, all based primarily on plaintiff counsel's conduct. Plaintiff's counsel proved so troublesome, in fact, the trial court eventually had to set firm rules with respect to objections during trial:

> And what the Court's going to do from this point forward is when there is an objection, what will happen is the party asserting the objection will stand up and say, "I object." The party will not say why. Each will approach the bench and the Court will address the objection outside the presence of the jury in that way.

The trial court took issue with plaintiff's counsel several times over his behavior as well. In ruling on defendant's first motion for mistrial, made immediately after plaintiff's counsel's opening statement, the trial court acknowledged that plaintiff's counsel was the type of attorney that needed to be calmed down. After denying defendant's second motion for mistrial, the trial court cautioned plaintiff's counsel:

> I would caution you Mr. Konheim in the future, though. You do have this habit of trying to push the bubble with your comments, with your editorials, and over the larger scheme of things, if you continue to do that, it could cause problems, so you need to be careful about that.

The trial court further admonished counsel during trial, stating, "Mr. Konheim, you have a habit of lecturing in your questions" and, "I'm troubled by two things. Number one, your questions tend to lecture, and it's an attempt to testify by you" and, "It's obvious that you need to be more careful." In denying defendant's third motion for mistrial, the trial court told plaintiff's counsel, "You better start holding your tongue because you're creating problems" and:

> Mr. Konheim, when you say that the defense is trying to confuse the jury, when you say 'why do you want to keep interrupting, why do you object, don't you want everyone to hear what the witness will say' you're setting yourself up.

The trial judge in this case valiantly and repeatedly attempted to keep plaintiff's counsel in check. There is a point, however, when an attorney's deliberate misbehavior becomes so repetitive and egregious that it necessarily impacts the jury, notwithstanding the judge's efforts. That point was reached here. If the court cannot say that the result was not affected, then a new trial may be granted. *Reetz, supra*. Plaintiff's counsel's inappropriate comments permeated the trial and we cannot say that the result was not affected. A new trial is warranted based upon plaintiff's counsel's pervasive misconduct and, accordingly, we reverse and remand for a new trial.

Our disposition makes it unnecessary to decide the majority of the other issues raised on appeal. However, because we remand for a new trial, we will address questions likely to arise again.

In this matter, plaintiff sued Dr. Boucree as well as defendant, but settled with Dr. Boucree before trial. Defendant contends that under joint tortfeaser liability, she was entitled to a set-off of the Boucree settlement amount. We disagree.

Tort reform abolished joint tortfeaser liability in most personal injury cases, except in certain, very specific instances. MCL 600.2956 provides, "[e]xcept as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint." MCL 600.6304 refers to medical malpractice cases and provides, in relevant part:

> (6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:
> (a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in section 5838a(1).
> (b) If the plaintiff is determined to have fault under subsections (1) and (2), upon motion made not later than 6 months after a final judgment is entered, the court

> shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, whether or not another party is a person or entity described in section 5838a(1), according to their respective percentages of fault as determined under subsection (1). . .

The statute, by indicating that "1 of the following applies" unequivocally provides that *either* (a) or (b) applies. Subsection (a) states that "if the plaintiff is determined to be without fault. . .the liability of each defendant is joint and several." Subsection (b), on the other hand, states that "if the plaintiff is determined to have fault. . . the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties . . ." The statutory provision is exclusionary and contemplates that if a plaintiff is not at fault, then (a) will apply, but if a plaintiff is at fault (b) will apply.

This Court has observed on several occasions that the exception to joint and several liability in medical malpractice actions is joint and several only if the plaintiff is without fault: "However, this case falls within an exception to that rule because it is a medical malpractice action in which plaintiffs have been determined to be without fault. MCL 600.6304(6)(a). Accordingly, the liability of each defendant is joint and several...." *Bell v Ren-Pharm, Inc,* 269 Mich App 464, 467; 713 NW2d 285 (2006); "Accordingly, notwithstanding the statute's retention of joint and several liability in medical malpractice actions where a plaintiff is not at fault. . ." and "Reading subsections 6304(1) and (2) with subsection 6304(6), the jury must first allocate fault under subsections 6304(1) and (2) and, in a medical malpractice case, if the plaintiff is without fault, liability is joint and several. . ." *Salter v Patton*, 261 Mich App 559, 563-564; 682 NW2d 537 (2004); "Under the current statutory scheme, MCL 600.2956 abolished joint liability in most circumstances. However, joint and several liability still exists in medical malpractice cases where the plaintiff is without fault, such as the present case. MCL 600.6304(6)(a)" *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 251-252; 660 NW2d 344 (2003).

Because plaintiff was found to be 20% at fault in this case, MCL 600.6304(6)(a) is inapplicable and liability is several only. Defendant is thus not entitled to a setoff of Boucree's settlement amount based upon joint and several liability. Moreover, since tort reform was passed in 1995, each defendant is liable only for his percentage of fault. MCL 600.2957(1). Consequently, in a case where a codefendant settles, there is no need for a setoff because the nonsettling defendant is "responsible for an amount of damages distinct from the settling defendant on the basis of allocation of fault." *Markley, supra* at 255. "Therefore, a settlement payment cannot be deemed to constitute a payment toward a loss included in a later damage award entered against the nonsettling tortfeasor." *Id*.

Defendant next argues that if liability is several only, she was entitled to ask the jury to allocate fault to Dr. Boucree and the trial court erred in precluding the allocation of his fault. While the trial court initially ordered that that the fault of Dr. Boucree could be argued by the defense at trial, the trial court ruled at the conclusion of trial that the issue of Dr. Boucree's fault

could not appear on the jury verdict form because (1) no one testified during the trial as to whether Dr. Boucree violated the standard of care and (2) no one testified that Dr. Boucree proximately caused plaintiff's damages.

The fact-finder's obligation to apportion fault among all liable persons is not altered by the creation of joint and several liability in medical malpractice actions. *Barnett v Hidalgo*, 478 Mich 151, 169; 732 NW2d 472 (2007). The jury is required to allocate fault of all persons, parties as well as nonparties; a jury may hear evidence regarding every alleged tortfeasor who has been involved, even parties who have been dismissed, and by the same token, a party must be permitted to refer to the involvement of nonparties. *Id.* Notwithstanding the statute's retention of joint and several liability in medical malpractice actions where a plaintiff is not at fault, MCL 600.6304(6) explicitly requires an allocation of fault under subsections 6304(1) and (2). Further, the medical malpractice subsection, subsection 6304(6), refers the reader to subsections 6304(1) and (2) and subsection 6304(1) states that the jury or fact-finder *shall* allocate fault. "The word 'shall' is unambiguous and is used to denote mandatory, rather than discretionary, action." *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 537; 669 NW2d 594 (2003). "The allocation of fault is not limited to situations where a plaintiff was at fault; subsections 6304(1) and (2) plainly require a comprehensive allocation of fault" regardless of whether joint and several liability ultimately applies. *Salter v Patton, supra*, at 564.

Clearly, defendant was entitled to an allocation of fault of all persons responsible for plaintiff's injuries. At issue, then, is whether the trial court erred in disallowing an allocation of fault to Dr. Boucree based on its determination that there was no testimony concerning whether Dr. Boucree violated the standard of care or whether he proximately caused plaintiff's damages.

MCL 600.6304(8) provides:

> As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

While defendant would argue that standard of care testimony is not required to prove a non-party was at fault in a medical malpractice case, we note that the non-party alleged to be at fault, Dr. Boucree, was a doctor and his alleged fault in causing plaintiff's injuries stemmed from his medical treatment of plaintiff. Defendant, in requesting an allocation of fault to Dr. Boucree, argues, in essence, that Dr. Boucree was at fault due to his actions or failure to take actions that were required of him as plaintiff's treating physician. As a physician can only be found to be at fault in a direct medical malpractice action for causing a person's injuries associated with his treatment of the patient if he breached the applicable standard of care (see, e.g., *Wiley v Henry Ford Cottage Hosp, supra*), logic would dictate that the act or omission which provides a basis for holding a doctor liable as a non-party at fault must also be supported by standard of care testimony. The fact-finder must, after all, have a criterion against which to measure a non-party doctor's actions in allegedly causing a plaintiff's injuries.

While defendant is correct that MCL 600.6304(8) provides only a general definition for the term "fault," the statute also provides that " 'fault' *includes* an act, an omission. . ." The language of the statute suggests, then, that the provided definition of "fault" is not exclusive. The statute provides no room for interpretation, however, of its requirement that the act or omission complained of be a proximate cause of damage sustained by a party. We clarify, then, that for purposes of an allocation of fault to a non-party doctor in a medical malpractice action, standard of care evidence is necessary.

Here, the trial court ruled, in a pre-trial order, that the allocation of fault with respect to Dr. Boucree could be argued. During trial, the issue arose again and the trial court ultimately ruled that counsel could ask Dr. Boucree about his treatment of plaintiff and his opinion as to whether he violated the standard of care. Unfortunately, the trial court did not always adhere to its ruling during trial and precluded the questioning of Dr. Boucree on this very issue. More unfortunately, the trial court then disallowed an allocation of fault to Dr. Boucree on the verdict form, stating that because no one testified to the standard of care as to Dr. Boucree, and because there was no testimony that Dr. Boucree proximately caused injury to plaintiff, the question of his negligence could not be put to the jury. Given that standard of care evidence is necessary for an allocation of fault to a non-party doctor, standard of care testimony concerning Dr. Boucree should have been allowed at trial (as the trial court had appropriately ruled) and shall be allowed in the new trial.

As a related issue, we see no error in the trial court's allowing defendant to present evidence concerning Dr. Boucree's fault despite the fact that defendant failed to comply with the requirements of MCR 2.12(K). MCR 2.112(K)(3)(c) provides that a notice of nonparty fault:

> must be filed within 91 days after the party files its first responsive pleading. On motion, the court shall allow a later filing of the notice on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party.

True, in this matter there was no motion requesting leave to file a notice of nonparty fault. However, with respect to a late filing of a notice of nonparty fault, the court's discretion is limited; "the court *shall* allow a later filing" if (1) the facts were not and could not have been known with reasonable diligence and; (2) the late filing does not result in unfair prejudice to the opposing party. Dr. Boucree was dismissed from the case after settling with plaintiff and defendant filed a notice of non-party fault shortly after the order of dismissal was entered. The need for filing a notice of nonparty fault was not apparent until the order of dismissal was entered; thus, the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier. MCR 2.112(K)(3)(c). See, e.g., *Salter v Patton, supra.*

There is also no basis for concluding that the late filing would result in unfair prejudice to plaintiff. Plaintiff was aware of the potential liability of Dr. Boucree and, in fact, named Dr. Boucree as a defendant in his complaint and settled with him prior to trial. Defendant filed the notice of nonparty fault shortly after his dismissal (and over a year before trial) and there was no objection to the notice until a week before trial. Plaintiff, then, was not surprised or unfairly prejudiced by the noncompliant notice.

Had defendant filed the appropriate motion, the trial court would undoubtedly have granted the motion. This is evidenced by its January 26, 2006 order allowing for the allocation of fault to Dr. Boucree (implicitly granting permission to file a late notice of nonparty fault) and because the limited reasons for denying a late filing of a notice of nonparty fault are not present, arguably *requiring* the trial court to have granted any such request.

Finally, we turn to defendant's claim that the collateral source statute required the trial court to offset plaintiff's social security benefits from the judgment. MCL 600.6303 provides:

> In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

The collateral source rule is designed to prevent double recovery by plaintiffs. *State Auto Mut Ins Co v Fieger*, 477 Mich 1068, 1072; 730 NW2d 212 (2007).

Here, defendant sought collateral source setoff asserting that plaintiff received social security disability benefits beginning in 1995 (plaintiff admitted the same at trial, indicating that he received benefits for inability to work due to his HIV status) and that he sought past and future wage loss as a part of his lawsuit against defendant. Social security benefits are included within the definition of collateral source. MCL 600.303(4). Thus, the trial court, after the jury verdict, but before judgment was entered, was to review evidence submitted by the parties and determine whether any expense or loss was paid or is payable, in whole or in part, by a collateral source. The trial court denied the defendant's request for set-off of collateral source benefits, stating that:

> none of the expenses or losses argued by the Plaintiff at trial, and awarded by the jury, was ever paid by his Benefits. Additionally, the jury never heard about the Benefits and could not consider them in their deliberations. Accordingly, this Court determines that the Defendants are not entitled to any set-off pursuant to MCL 600.6303.

The ruling is somewhat confusing. The first sentence of the court's ruling indicates that none of the expenses or losses claimed by plaintiff were paid by social security. There is no explanation of the basis for the ruling, however. Moreover, the court did not determine whether any of plaintiff's losses or expenses were *payable* by social security.

The second sentence is more concerning, as the trial court appears to have based its ruling, in part, on the fact that no evidence was presented to the jury about plaintiff's social security benefits. However, MCL 600.6303 provides that evidence regarding collateral source setoff is to be presented *to the court*, *after* the verdict. The evidence regarding any benefits subject to setoff were not supposed to be presented to the jury. Deductions of setoffs paid from collateral sources and reductions of future damages to present value are actions taken by the trial court independent of any factual finding by the jury. *Szymanski v Brown*, 221 Mich App 423, 434; 562 NW2d 212 (1997). If the new trial results in a judgment against defendant, the trial court must, pursuant to the unequivocal language MCL 600.6303, independently determine if any of the losses awarded plaintiff were paid or are payable by a collateral source, even if it does not agree with statute.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto